INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Questions presented	2
Statement:	
A. The Board's findings of fact and conclusions of law	3
1. Petitioner's status as an employer	3
2. The unfair labor practices	7
3. The facts relating to petitioner's procedural contention	9
B. The decision of the court below	10
Argument	11
Conclusion	15

CITATIONS

Cases:

National Labor Relations Board v. *Don Juan, Inc.*, 178 F. 2d 625	14
National Labor Relations Board v. *Greater New York Broadcasting Corp.*, 147 F. 2d 337	12
National Labor Relations Board v. *MacKay Radio & Telegraph Co.*, 304 U. S. 333	12
National Labor Relations Board v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756, certiorari denied, 342 U. S. 919	14
National Labor Relations Board v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547	13
National Labor Relations Board v. *Stowe Spinning Co.*, 336 U. S. 226	14
National Licorice Co. v. *National Labor Relations Board*, 309 U. S. 350	12
Olin Industries, Inc. v. *National Labor Relations Board*, No. 586, October Term, 1951, certiorari denied, 343 U. S. 919	12
Press Co., Inc. v. *National Labor Relations Board*, 118 F. 2d 937, certiorari denied, 313 U. S. 595	14

Statutes:

National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*):	
Section 8 (a) (3)	8, 11

In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 54

MODERN MANUFACTURING COMPANY, INC.,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The original opinion of the court below (R. 479-483) is reported at 193 F. 2d 613. The order denying rehearing (R. 489) was issued February 13, 1952, without opinion. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 15-155), are reported at 90 NLRB 1676.

JURISDICTION

The judgment of the court below was entered on February 14, 1952 (R. 490). The petition for a

writ of certiorari was filed on May 9, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix to the petition, pp. 10-13.

QUESTIONS PRESENTED

1. The complaint alleged that petitioner unlawfully locked out all of its employees between October 27, and November 29, 1949. At the hearing it appeared that the lockout continued as to a portion of the employees after November 29. The legality of petitioner's continuation of the lockout was fully litigated. The Board found that the lockout, illegal in its inception, was illegally continued after November 29 and ordered appropriate remedial relief. The first question presented is whether, under these circumstances, the Board was precluded from finding that the illegal lockout continued after November 29, because continuation of the lockout was not alleged in the complaint.

2. Whether the Board properly found that petitioner, together with Somerset Classics, was responsible as an "employer" for the unfair labor practices in question.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Upon the usual proceedings under Section 10 of the National Labor Relations Act, as amended, the Board, on August 2, 1950, issued its findings of fact, conclusions of law, and order. In large part the Board's decision on the merits is not presently in issue. The narrow questions presented here involve only petitioner's status as an employer and the sufficiency of one aspect of the complaint. The facts pertinent to these issues may be summarized as follows:

1. *Petitioner's status as an employer*

The complaint alleged and the Board found that petitioner, Modern Manufacturing Company, Inc., and Somerset Classics, Inc., were joint employers and were jointly responsible for the unfair labor practices which occurred at Somerset's plant at Rome, New York.[1] Both petitioner and Somerset are New York corporations, engaged in the ladies' garment business. Modern purchases piece goods for the manufacture of ladies' dresses, cuts the material into garment sections at its own plant,[2] ships the sections to other firms for sewing and com-

---

[1] Somerset Classics, Inc., has not appealed from the decision of the court below. In the proceedings before the court below, Somerset alleged that it was insolvent and on the verge of dissolution (R. 483).

[2] Modern operates a cutting plant under the trade name of Beacon Company (R. 101, 162, 171).

pletion, and then sells the completed garments to retail concerns (R. 23, 36; 169). Somerset works exclusively for Modern (R. 36; 165-166, 325, 350, 362). Outdoor Frocks, Inc., of Philmont, New York, and Greenwich Garment Company of Greenwich, New York, like Somerset, also work exclusively on Modern's garments (R. 23, 36, 132-133; 166, 159, 359-360). These three firms do the bulk of Modern's work (R. 133; 400, 458, 460, 461).[3]

Petitioner Modern and its three major contractors, Somerset, Outdoor and Greenwich, are completely owned, controlled, and operated as an integrated enterprise by members of the Friedman family which consists of Sigmond Friedman, Bertha, his wife, David their son, and Joseph and Max Donner (also known as Friedman) the sons of Mrs. Friedman by a previous marriage (R. 23, 35-36; 164, 169-170, 172, 352, 356, 468-470). The majority stockholder of Modern is Sigmond Friedman; the remaining shares are held by his wife and three sons (R. 35, 131; 374-375, 470). Mrs. Friedman and the three brothers own all the stock of Greenwich and Outdoor (R. 36, 131-132; 167, 171, 468, 469). Outdoor owns all of the Somerset stock (R. 24, 36, 132; 165, 172, 469). The five members of the Friedman family serve as directors and officers of the various Friedman companies (R. 131-132; 468-470). The president, vice president, and secretary-treasurer of Somerset are also, respectively, second vice president, vice president and

[3] In the parlance of the garment industry Modern is known as a jobber and the other firms, contractors (R. 23, 36; 166).

secretary of Modern (R. 23-24; 164, 165, 469, 470).[4]

The business affairs of all the Friedman companies, as a practical matter, are carried on as if they were one firm.[5] Sigmond Friedman, founder of the business, stated that he "ran the whole business with the boys and [his] wife as more or less a family matter." (R. 406). Although Sigmond

[4] The following tabulation, based upon exhibits in the record (R. 469-470), depicts the interlocking character of the Friedman enterprises:

Officers:	*Modern*	*Greenwich*	*Outdoor*	*Somerset*
Pres.	Sigmond Friedman	Joseph Donner	Max Donner	David Friedman
V. Pres.	Joseph Donner	—	—	Joseph Donner
2nd V. Pres.	David Friedman	—	—	} Max Donner
Sec'y.	Bertha Friedman	Max Donner	Joseph Donner	
Treas.	Max Donner	David Friedman	B. Friedman	
Directors:				
1	S. Friedman	J. Donner	B. Friedman	D. Friedman
2	Sam Negin	M. Donner	M. Donner	M. Donner
3	B. Friedman	B. Friedman	J. Donner	J. Donner
4	M. Donner	—	—	—
Stockholders:				
1	S. Friedman—101 Sh.	J. Donner—50 Sh.	D. Friedman—12 Sh.	Outdoor Frocks—200 Sh.
2	M. Donner—28 Sh.	M. Donner—50 Sh.	B. Friedman—14 Sh.	
3	D. Friedman—28 Sh.	B. Friedman—50 Sh.	J. Donner—12 Sh.	
4	J. Donner—13 Sh.	D. Friedman—50 Sh.	M. Donner—12 Sh.	
5	B. Friedman—30 Sh.			

[5] Historically, as well as operationally, Modern is the parent company of the Friedman enterprises. Modern was originally a partnership consisting of Sigmond Friedman and Bertha Donner, a widow. The two partners were subsequently married and eventually Mrs. Friedman's sons by her former marriage, Max and Joseph, were taken into the business, along with David Friedman, a son of the present marriage. In 1935, the entire assets of Modern were transferred to a newly formed corporation of the same name, the ownership of the new corporation being divided among the various members of the family (see n. 4). In 1933, prior to the incorporation of Modern, Friedman formed another corporation, Outdoor Frocks, and distributed the ownership among the various members of his family. The Greenwich and Somerset corporations were formed by the Friedmans in 1943 and 1947 respectively, and the ownership and control of these corporations is divided among the Friedmans in the manner indicated above (see n. 4) (R. 131-132; 374-376, 406, 356-357, 164, 379-380).

Friedman exercises ultimate control over Modern, he is aided in the conduct of the business by his sons, David and Joseph, who are in charge of Modern's sales and production matters (R. 24, 133; 356, 361-362, 384-385, 406-407). In addition to their duties for Modern, David and Joseph also exercise full control over the production operations and labor relations of Somerset, Outdoor and Greenwich (R. 23, 24, 133, 137; 327, 362, 365-367, 371; 407-408, 417).

The financial records and books of all the firms are kept in Modern's offices in New York or at the office of a commonly employed accountant (R. 134; 168, 171, 378); Somerset's payroll lists are sent to Modern's offices where Modern's bookkeeper performs the necessary clerical work and prepares the payroll checks on Somerset's account (R. 134; 350-351, 426-427, 452); when necessary, Modern advances funds to Somerset in order to meet the payroll (R. 135, 363); no formal billing practices are followed between Modern and the other Friedman concerns (R. 135; 160, 162). Each of the three Friedman brothers draws a salary from the contracting firm of which he is president, and also draws a salary from Modern (R. 134-135; 415, 429-430).

When Sigmond Friedman became ill in October 1948, at about the time the unfair labor practices occurred, David acquired the additional responsibility for allocating Modern's work to the subsidiary firms (R. 19, 24, 139-140; 388-389, 389-390, 398-399, 346-347, 425-426, 433-437). While acting in

this capacity, as an officer of Modern, David made the decision to stop sending work to Somerset, which was then being organized by the Union, and to curtail its workload when it resumed operations, and thus, as the Board found (R. 24, *ibid.*), "made Modern the means of accomplishing the anti-union policies of Somerset."

On the foregoing facts the Board found (R. 23-24, 128-140) that Modern and Somerset were engaged in a single integrated enterprise and that both were employers of the employees involved and jointly responsible for the unfair labor practices summarized below.

2. *The unfair labor practices*

Early in October, 1948, representatives of the Union [6] asked Somerset's local manager for a bargaining conference (R. 22, 116-117, 119, 125; 318, 319). He referred this request to David Friedman in New York (R. 22, 122, 127; 408, 450). Shortly thereafter, the shop forelady, wife of the local manager, made a speech to the employees stating that the plant would be closed if the Union campaign was successful (R. 17, 39, 41-47; 189-190, 201-202, 210-211, 229, 248-244, 263-264, 271, 291, 301, 304). A week or so later Joseph Donner [Friedman] made a similar speech to the Somerset employees (R. 17, 47-48; 190-192, 202-203, 204-206, 211-212, 220, 230-231, 232-233, 238-239, 244-245, 256-258,

[6] International Ladies' Garment Workers Union, A. F. of L., which had been designated by the employees as their bargaining agent.

264-266, 291, 292-293, 296, 297-298, 304-305, 311-315). Thereafter, with the consent of the local manager (R. 54-60), an anti-union petition was circulated among the employees (R. 17, 54-60; 244, 252-253, 305, 471-472). Finally, starting October 25, David Friedman, who was then president of Somerset and also, in his father's absence, the effective head of Modern, stopped sending goods to Somerset, thereby causing the plant to close down entirely on October 27, 1948 (R. 24, 139-140; 346-347, 433-437). A month later, Modern, still under David's control, resumed shipments to Somerset but on a greatly curtailed scale (R. 139-140; 425-426). Thereupon, Somerset partially resumed operations (R. 91-95; 425).

Upon these facts the Board found (R. 17-25; 41-128) that Modern and Somerset, in violation of Section 8 (a) (1) of the Act, interfered with, restrained and coerced their employees; in violation of Section 8 (a) (5), refused to honor the Union's bargaining request; and, in violation of Section 8 (a) (3), closed the Somerset plant on October 27, 1948, in order to discourage membership in the Union. The Board further found (R. 19, 88-95, 110), that Modern and Somerset, in violation of Section 8 (a) (3), continued, for the same illegal purpose, partially to maintain the lockout after November 29. The Board accordingly ordered (R. 27-31) petitioner and Somerset to cease and desist from the unfair practices found, to bargain collectively with the Union, to reinstate those employees locked out on October 27 who have not yet been reinstated, and to make whole all employees

for losses of pay suffered by reason of the discriminatory lockout.

3. *The facts relating to petitioner's procedural contention*

The complaint initiating this proceeding alleged, *inter alia,* that Modern and Somerset locked out Somerset's employees on October 27, 1948, and refused to reinstate them until November 29, 1948 (R. 11). The complaint further alleged, as a separate violation, that petitioner and Somerset discriminatorily refused to rehire eleven named employees after the plant reopened on November 29 (R. 11). On the basis of evidence adduced at the hearing the examiner found that the lockout of October 27 was not motivated by economic considerations, as petitioner and Somerset alleged, but was designed to defeat the Union (R. 64-88). The examiner also rejected the companies' contention that Modern limited its shipments to Somerset after November 29 for legitimate business reasons, and found that the reduction in shipments was designed, like the initial lockout, to defeat the Union (R. 88-95, 110). As a consequence of the reduction in shipments, of 70 employees on the payroll prior to October 27, only 49 were taken back on or after November 29 and 21 remained locked out (R. 96-97). In these circumstances the examiner found it unnecessary to pass on the allegation (R. 11, par. 12) that petitioner and Somerset had discriminatorily refused to rehire the employees named in the complaint, stating that "once an employee's rights have been violated by discriminatorily locking him

out, it is unnecessary to show that he was twice wronged by having been further discriminated against in the process of rehire" (R. 90). Although the examiner noted that more than the eleven persons alleged to have been discriminatorily denied reinstatement were affected by the partial continuation of the illegal lockout after November 29 (R. 96-97), he did not recommend reinstatement or back pay for all because they were not all named in the complaint.

The Board agreed with the examiner's finding that the lockout was illegally continued in part after November 29 (R. 19), and held that it was not precluded from remedying the violation in full by the failure of the complaint to allege that the lockout was partially continued after November 29. The Board said: "the violation found is of the same class of violation as that set up in the charge and complaint, and was a continuation of it in pursuance of the same objective" (R. 19, n. 11). Disagreeing with the trial examiner, the Board further held that in affording a remedy for this violation it was not limited by the independent allegation of the complaint, upon which it did not rely, that eleven employees were discriminatorily denied reinstatement after November 29. Consequently, the Board awarded reinstatement and back pay to all victims of the partial lockout (R. 25, 22, n. 21).

B. THE DECISION OF THE COURT BELOW

The Court of Appeals for the Second Circuit held that evidence on the record considered as a

whole sustained the findings of the Board. The court found (R. 482) that "substantial evidence supports the mutual responsibility of the two corporations [Modern and Somerset] for the acts in question." With respect to petitioner's procedural contention the court held (R. 483) that the Board's "jurisdiction having been invoked in regard to the initial plant shutdown and measures properly remedial thereto, any unfair labor practice growing out of and related to this form of violation comes within the Board's authority."

ARGUMENT

1. Petitioner's contention that in the absence of an allegation in the complaint that the illegal lockout was continued after November 29, the Board was powerless so to find raises no substantial issue warranting review by this Court. As the facts set forth above show, and as the trial examiner, the Board and the Court of Appeals found, the continuation of the lockout was part and parcel of the very transaction alleged in the complaint as a violation of Section 8 (a) (3) of the Act. Moreover, the precise question—the reason for reduced shipments from Modern to Somerset after November 29—was the subject of proof and counterproof by the Board and by petitioner at the hearing (R. 421-425, 465, General Counsel's Exhibits 3 and 4).[7] Spe-

[7] R. 465 shows the number of employees excluded after Somerset resumed operations on November 29. General Counsel's Exhibits 3 and 4 are accounting records of the Friedman enterprises which were not fully incorporated in the printed record because of their volume. On the basis of these accounting records the Board concluded (R. 91-95),

cifically, petitioner attempted to prove that the reduction in shipments which resulted in the partial lockout after November 29, was motivated by business considerations (R. 421-425). There is thus no merit in petitioner's claim (Pet., p. 3), that at the hearing "There was no issue of a general or partial lockout *after* November 29, 1948," and accordingly, there is no basis for its assertion that (Pet., p. 7), a "question of unfairness" is present which distinguishes this case from *National Licorice Co.* v. *National Labor Relations Board,* 309 U. S. 350. Indeed, although the trial examiner found that the continuation of the lockout was illegally motivated (R. 88-95), petitioner made no effort to reopen the record to adduce additional evidence on that question, and petitioner made no such motion either to the Board or the court below even after the Board in its decision granted full relief to the victims of the partial lockout. Cf. *National Labor Relations Board* v. *Greater New York Broadcasting Corp.,* 147 F. 2d 337, 339 (C. A. 2). Far from raising a substantial due process issue, petitioner's claim, at best, is "highly technical" (*National Labor Relations Board* v. *MacKay Radio and Television Co.,* 304 U. S. 333, 349-351) and merits no further review. See our brief in opposition to certiorari in *Olin Industries, Inc.* v. *National Labor Relations Board,* No. 586,

---

contrary to petitioner's contention (R. 421-425), that Modern could have shipped Somerset enough work to keep it operating at pre-lockout capacity, but failed to do so for the same illegal reasons which motivated the original lockout.

October Term, 1951, p. 21, certiorari denied, 343 U. S. 919.

Petitioner's reliance upon the fact that the General Counsel did not amend the allegation of the complaint which named eleven specific employees as having been discriminatorily denied reinstatement after November 29, is misplaced. As the court below observed (R. 482-483):

> The Board relied upon the trial examiner's finding not of discrimination, but of the continued partial lockout, a violation of Sec. 8 (a) (1) and (3) which affects all those not rehired.

For this reason, *National Labor Relations Board* v. *Reliable Newspaper Delivery, Inc.*, 187 F. 2d 547 (C. A. 3), cited by petitioner (Pet., p. 6), is not in point, as the court below noted (R. 482). That case, in the Third Circuit's view (187 F. 2d, at 550), involved only allegations that named individuals had been discriminated against, and did not involve a blanket unfair labor practice, such as a lockout, which, by its very nature, affects all employees.[8]

2. The holding of the Board and the court below that petitioner, as well as Somerset, was responsible for the unfair labor practices here involved rests entirely upon the Board's factual finding, sus-

[8] In addition, it should be observed that the language in the *Reliable* case to which petitioner refers is merely dictum and not a holding. The case was decided on entirely different grounds. 187 F. 2d, at 550.

tained by the court below, that the two firms were operated as a single integrated business (R. 23-24, 128-140, 482). That finding, as the evidence set forth above (*supra*, pp. 3-7), shows, is abundantly supported. In any event, petitioner's challenge poses no issue of general importance which warrants review by this Court. *National Labor Relations Board* v. *Nu-Car Carriers, Inc.*, 189 F. 2d 756 (C.A. 3), certiorari denied, 342 U. S. 919.

Contrary to petitioner's claim (Pet., p. 8), there is no conflict on the proposition that when two or more nominally separate corporations operate as a single entity, both may be held responsible for unfair labor practices affecting the employees of one of the corporations. *National Labor Relations Board* v. *Stowe Spinning Co.*, 336 U. S. 226, 227; *National Labor Relations Board* v. *Don Juan, Inc.*, 178 F. 2d 625, 627-628 (C. A. 2). Indeed, in *Press Co., Inc.* v. *National Labor Relations Board*, 118 F. 2d 937, 947 (C. A. D. C.), certiorari denied on matters not here relevant, 313 U. S. 595, with which petitioner claims conflict (Pet., p. 8), the court suggested that if the corporate respondents there involved had operated as a single integrated business, the court would have sustained the Board's order.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
MOZART G. RATNER,
Assistant General Counsel,
LOUIS SCHWARTZ,
Attorney,
National Labor Relations Board.

JUNE, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 910980 1917